United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-5024

To be argued by
ARTHUR L. LIMAN

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United States Court of Appeals

For the Second Circuit

HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt,
Plaintiff-Appellant,

against

NEW YORK PRODUCE EXCHANGE, *et al.*,
Defendants-Appellees.

Appeal from a Judgment of the United States District Court for the Southern District of New York

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BRIEF OF DEFENDANTS-APPELLEES HAROLD H. VOGEL and CONTINENTAL GRAIN COMPANY

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Preliminary Statement

This brief is submitted by defendant-appellee Harold H. Vogel and his employer, Continental Grain Company ("Continental") to supplement the principal brief submitted by all defendants-appellees ("defendants").

As defendants' principal brief demonstrates, the judgment below must be affirmed as to all defendants. We adopt and rely on the statement of issues, the factual presentation and the argument in that brief. As to Vogel and Continental, however, there are additional grounds for affirmance.

There is not the slightest evidence to connect Vogel or Continental with any of the alleged wrongdoing on which plaintiff's case is based. Plaintiff's most important pieces of evidence were not even admitted, or indeed offered against Vogel or Continental. In addition, Continental's conduct during the key November 14-19 period contradicted plaintiff's theory—for Continental was *buying* cottonseed oil futures when a wrongdoer would have been selling them to exploit the market decline. The judgment in favor of Vogel, and Continental, which is sued solely on a theory of vicarious liability, was the only judgment possible on this record. Plaintiff's appeal from the judgment in their favor is frivolous.

Statement of Additional Facts

The basic facts of the case are stated in defendants' principal brief. We add this further statement because, to appreciate the minor role which Harold Vogel and Continental played in the events of 1963, it is first necessary to understand: (1) that Vogel's employment by Continental had no connection whatever with the vegetable oil trade; (2) that Vogel's role on the New York Produce Exchange Board of Managers was that of a generalist, not a cottonseed oil specialist; and (3) that Vogel did not serve as an agent of Continental on the Exchange Board.

Vogel's Lack of Connection with the Vegetable Oil Business

Plaintiff says that all of the individual defendants, including Vogel, were subject to "the inherent conflict of wearing two hats—one as a regulator and the other as a businessman involved in the trade being 'regulated' " (Br., p. 2). As to Vogel, there is not one ounce of truth in this assertion. Vogel, as a businessman, had nothing whatever to do with the cottonseed oil trade.

Vogel, in 1963, was an Executive Vice President of Continental, who had spent his entire career in the grain business, Continental's principal field of activity. Since 1961, he had been a member of the Board of Managers of the Exchange, representing the grain trade, pursuant to the provisions of the Exchange by-laws requiring apportionment of directorships among the different trades—vegetable oil, grain and so forth (Vogel, JA 1507a-1508a; PX 55, §7, JA 259e).*

Vogel had no experience in vegetable oil, no expertise in that field, and no knowledge of or responsibility for his employer's cottonseed oil business. Indeed, it was the sheerest coincidence that Continental was itself engaged in the vegetable oil trade at the time of the events in suit. On March 1, 1963—after Vogel had served on the Exchange Board of Managers for two years—Continental merged with its affiliate Arrow Continental Corporation ("Arrow"), which dealt in vegetable oils (Vogel, JA 1501a, 1507a).

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*"JA" refers to the Joint Appendix—Plaintiff's exhibits are designated "PX" and defendants' "DX" followed by the Joint Appendix reference—"Br." refers to plaintiff's brief in this Court.

Vogel had nothing to do with Arrow before the merger; after the merger, he had nothing to do with Continental's oil business, which continued to be run as an autonomous division (Vogel, JA 1501a-1502a). The head of the Continental oil division, Raphael Totah, reported exclusively to Michel Fribourg, the President of Continental (Totah, JA 1606a-1607a). Vogel had no authority over Totah or his division's activities, and was not privy to its affairs (Vogel, JA 1503a).

Plaintiff has been attempting for at least 10 years to find some evidence that Vogel's conduct as a member of the Board of Managers was influenced in some degree by Continental's interest in the vegetable oil trade. No scrap of evidence to this effect was ever found; the proof offered on plaintiff's own case is directly and conclusively to the contrary (Vogel, JA 1488a-1495a, 1497a, 1501a-1505a; Ferretti, JA 1470a-1471a; Stafford, JA 1583a; Totah, JA 1606a-1607a; Fribourg, JA 1610a). Vogel maintained a strict and absolute separation between his duties on the Exchange Board of Managers and Continental's private business interests. There is no evidence that he ever took Continental's oil position into account in exercising his regulatory duties. Indeed it is undisputed that he did not even know at the time he exercised those duties what Continental's position was (Vogel, JA 1517a) and he was complimented on November 19, 1963 for voting in total disregard—and ignorance—of Continental's interest in the oil market (Vogel, JA 1517a-1518a). There was no basis at all for including him in this suit.

Vogel's Role on the Board of Managers

(a) Vogel Was Not a Cottonseed Oil Specialist

Because Vogel was a representative of the grain trade and had no background or expertise in vegetable oil, his specific contributions to the Exchange Board of Managers were in areas not directly related to cottonseed oil futures trading—a proposed merger with other exchanges, negotiations for sale of real property owned by the Exchange, and negotiation for the taking over of a government fleet in the Hudson River which was available for storage purposes (Vogel, JA 1514a). Vogel was not a member of the Exchange's Business Conduct Committee, the Cottonseed Products Committee, the Quotation and Supervisory Committee, or any of the committees directly concerned with trading on the Produce Exchange floor (PX 189, JA 577e-578e). Vogel was not expected by the Exchange or his fellow directors to be an expert in the cottonseed oil futures market. Rather he was expected to exercise his good judgment on matters presented to the Board.

The comments of Judge Learned Hand in *Barnes* v. *Andrews,* 298 Fed. 614, 618 (S.D.N.Y. 1924), are relevant here:

> "Directors are not specialists, like lawyers or doctors. They must have good sense, but they need not—indeed perhaps they should not—have any technical talent. They are the general advisers of the business and if they faithfully give such ability as they have to their charge, it would not be lawful to hold them liable."

Similarly, in *Lanza* v. *Drexel & Co.,* 479 F.2d 1277 (2d Cir. 1973), the Court said:

> "'[T]here are a great many [directors who] . . . are not personally familiar with all details of operation. Nor could their services be obtained in most cases if they were required to investigate details of the enterprise. The experience and judgment of men of affairs is of great value to most of our more important corporations. To deprive enterprises of this asset would seem uneconomic in view of the slight gains which may be expected.'" 479 F.2d at 1307, quoting from Professor, now Justice, Douglas and Professor Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 195 (1933).

Plaintiff's attempt to fasten $12,000,000 in liability on Harold Vogel on the absurd ground that *Vogel* should have detected Haupt's accumulation of contracts for Allied or Allied's trading irregularities ignores the reality and value of Vogel's role. If exchanges were directed only by specialists, the very opportunity for self-interest which plaintiff decries would exist. It is essential therefore that Boards have a membership that includes non-traders. To hold that such members can be liable because they do not have the knowledge or expertise of traders can only turn an exchange's Board of Managers into the most parochial trade association—contrary to all considerations of public policy.

(b) Vogel Was Not an Agent of Continental on the Exchange Board

The testimony below established, without contradiction, that Vogel did not consider himself, and was not considered by Continental, to be Continental's agent on the Exchange Board of Managers (Vogel, JA 1509a-1510a; Fribourg, JA 1613a-1618a). In contending that there was evidence

to the contrary (Br., pp. 96-99), plaintiff grossly distorts the record.

Plaintiff simply fails to distinguish two separate things —Vogel's status as one of several hundred Exchange members and his position on the Board of Managers. Vogel did not personally trade on the Exchange; he merely held one of Continental's Exchange memberships (Vogel, JA 1505a-1506a). Accordingly, Continental guaranteed any financial obligations Vogel might incur as an Exchange member and his application for Exchange membership mentioned that he was a Continental officer (PX 208, JA 655e). This does not in any way imply that Vogel served Continental's interest when he assumed a fiduciary role with the Exchange as a member of the Board of Managers.

The only other evidence cited by plaintiff in this connection is a quotation from the testimony of Michel Fribourg (Br., p. 97). The quotation is taken out of context so as to totally reverse its meaning. Fribourg testified unequivocally that Vogel, in serving on the Exchange, performed a public "duty", not a "duty" as an employee of Continental (Fribourg, JA 1611a, 1614a).

Plaintiff's Claim Against Vogel

Plaintiff has never seriously claimed that Vogel was guilty of any active wrongdoing in 1963. His case against Vogel is avowedly based on the argument that Vogel was guilty of negligent non-feasance. The facts, as we shall demonstrate, do not support even this claim. However, even if negligence by Vogel could be proved, that would not

support a judgment against Vogel here because as shown in the defendant's main brief: (1) Scienter—at the very least recklessness—is a necessary predicate to liability, even assuming that the Commodity Exchange created any private right of action against a director of an exchange for failure to regulate (see pp. 59-66); (2) Haupt's own misconduct, which went far beyond the mere negligence it attributes to Vogel, bars recovery (see pp. 52-59); and (3) no act or omission by any defendant was the cause of Haupt's loss (see pp. 66-68).

In any event, plaintiff's own evidence demonstrated that Vogel was not guilty of non-feasance. Thus, even under plaintiff's bare negligence theory there was a failure of proof.

ARGUMENT

POINT I

Vogel neither knew nor should have known about the activities of Haupt and Allied prior to November 14, 1963.

It is undisputed that Vogel did not know, prior to November 14, 1963, that Allied, through Haupt as its broker, was accumulating an enormous long position in cottonseed oil futures. There is no basis for claiming that Vogel should have known, and thus no basis for holding Vogel to be at fault in not initiating regulatory action. No market statistics or events even put Vogel on inquiry.

The principal basis for plaintiff's argument that the defendants should have been on inquiry prior to November

14, 1963 is the alleged statistical "warning signs" to which plaintiff's expert witnesses testified. This testimony, however, has no application to a director who, like Vogel, was not and was not expected to be an analyst of market information. Indeed, one of the plaintiff's expert witnesses, Professor Dahl, was, like Vogel, a director of a commodities exchange who was not personally involved in trading the commodity. Dahl candidly admitted that, as a non-trader director, he relied upon his exchange's specialists to identify statistical signs of trouble (Dahl, JA 324a).

Plaintiff also contends that certain events in 1963 should have led to an investigation by the Exchange or some of its directors. But this claim, too, cannot be made as to Vogel, because the events were never brought to Vogel's attention. The evidence showed, without contradiction, that Carl R. Berg's telephone call to the CEA in July (MacDonald, JA 664a), the two Weinstein letters of August 16 (PX 27, 28, JA 153e, 155e), Berg's September 1963 conversation with Milton Goldfogle (MacDonald, JA 664a-665a), the meeting between Exchange and Association officials on September 23 (Berg, JA 823a, 848a), and Berg's meetings with Stevens and DeAngelis in September and October (MacDonald, JA 664a; Berg, JA 845a, 846a-847a) were known to no individual defendant except MacDonald and, in the case of the September 23 meeting, Fashena.

Vogel was in frequent contact with Berg between board meetings concerning the special assignments which Vogel undertook for the Exchange. Berg at no time expressed to Vogel any concern over the state of cottonseed oil futures trading (Vogel, JA 1515a). Vogel shared the judg-

ment of all other witnesses that Berg and MacDonald were highly competent executives (Vogel, JA 1511a-1513a). MacDonald's testimony confirms that he did not communicate any concern to board members because he saw no reason for any such concern (MacDonald, JA 664a). A director in Vogel's position was entitled to rely—indeed, had to rely—on persons who were in daily touch with trading to bring any suspected irregularity to his attention.

The alleged activities on the Exchange floor—buying at the close of trading for example—which, according to plaintiff, were indicia of manipulation, were not and could not have been known to a director, who, like Vogel, was not on the floor himself. Nor could Vogel have known the extent of Allied's position or the intentions of DeAngelis and Gittleman to support the market—for the record is clear that traders' positions were known only to the trader and to the Commodity Exchange Authority (McMinn, JA 872a, 885a-886a), and that Allied's intentions were disclosed to no one (DeAngelis, JA 1098a-1102a).

Vogel was not even privy to whatever trade gossip there might have been on these subjects; he was not considered by his fellow board members as a participant in the vegetable oil trade, and was not included in their shop talk (MacDonald, JA 663a).

In short, nothing came to Vogel's attention before November 14, 1963, which should have led him to discover, or to investigate, any of the misconduct by Allied which plaintiff says occurred in that period.

Continental, because it was involved in the vegetable oil business, did have business dealings with Allied—one of

the principal vegetable exporters in the United States prior to November 1963. Nothing in these dealings, however, could have alerted Vogel to any threat posed by Allied to the cottonseed oil futures market for the dual reasons that the Continental-Allied transactions were wholly legitimate, and in any event Vogel knew nothing of them.

Plaintiff failed to show anything in the Continental-Allied business relationship which could have put anyone at Continental on notice that Allied was acting unlawfully. In particular, the ex-pit transactions, though attacked at great length by plaintiff, were shown at trial to be normal, legitimate business dealings.* (See pp. 30-32 of defendants' principal brief and pp. 25-32 of the brief of defendants Klein and Bunge.) DeAngelis, plaintiff's witness, admitted that he concealed from Continental his plans and intentions. Moreover, the testimony of all Continental witnesses demonstrated that Vogel knew practically nothing about the Continental-Allied relationship (Vogel, JA 1488a-1489a, 1495a, 1497a, 1501-1505a; Ferretti, JA 1470a-1471a; Stafford, JA 1583a; Totah, JA 1606a-1607a; Fribourg, JA 1610a). The testimony of DeAngelis and his associate, Gerald Gittleman, confirmed this by demonstrat-

* Plaintiff's brief (pp. 57-58) makes passing reference to other aspects of the Allied-Continental business relationship. For example, plaintiff seems to find significance in the fact that "Continental . . . expanded its insurance protection on oil pledged to it by Allied as collateral for loans" in September 1962. Of course, there is nothing sinister about this or any of the other conduct referred to by plaintiff. Plaintiff's contention that his questioning of witnesses concerning Continental's dealings with Allied was improperly limited by the District Court is frivolous, as a reading of the transcript pages cited in this section of plaintiff's brief will demonstrate.

ing that they had no business contacts with Vogel whatever (DeAngelis, JA 1099a; Gittleman, JA 1163a).

In short, the record provides no basis for any claim against Vogel with respect to the time period prior to November 14, 1963.

POINT II

Vogel had no role in the decision to keep the market open after November 14.

For the period after November 14, 1963, plaintiff's claim is that the Exchange wrongfully kept the cottonseed oil futures market open for four business days. This argument simply has no application to Vogel; he happened to be out of town on November 14, when some defendants learned of Allied's cottonseed oil futures position (Vogel, JA 1496a, 1516a). Vogel did not learn of the position on November 14, nor did he attend the Board of Managers meeting on that day, and he took no part in deciding the Exchange's reaction to the information. The evidence with respect to the meeting of November 14, 1963 was not even offered or admitted against Vogel. (See Preston, JA 433a).

Vogel's first contact with the events of November 14-19, 1963 occurred on the evening of November 18, when Berg called Vogel to obtain his approval of a price fluctuation limit to be effective the following day. Vogel agreed to the price fluctuation limit—which protected Haupt by limiting how far the price of cottonseed oil futures could fall. On the following day, November 19, Vogel attended the Executive Committee meeting and learned for the first time

of the size of Allied's position, the bankruptcy of Allied and the financial plight of Haupt. Vogel joined in the vote to close the market at once—characteristically, without even knowing or inquiring what Continental's position in cottonseed oil was (Vogel, JA 1518a). Plaintiff cannot and does not complain of the action taken by Vogel and his fellow directors, on either November 18 or November 19.

Indeed, plaintiff cannot and does not complain of any action by Vogel during the period November 14-19. Under these circumstances, it is hardly necessary to debate the state of mind of Vogel or Continental during the period. It is interesting, however, that the record provides clear and conclusive evidence of Continental's good faith: Continental was a net buyer of cottonseed oil futures contracts between November 14 and November 19, as well as a net buyer of cottonseed oil in terms of both futures and cash (Ferretti, JA 1477a). It did not "stand pat", as plaintiff claims (Br. p. 41), but bought 125 more contracts than it sold (Ferretti, JA 1477a; *see* DX 208, JA 1189e-1192e). By not "standing pat" in cottonseed oil futures, Continental lost $101,988 (Ferretti, JA 1478a). Plaintiff's claim that Continental made a profit from the price decline is based on statistical juggling designed to obscure the simple fact that buyers do not profit when a market goes down.*

* Plaintiff's claim that Continental "elected to stand pat" is based on the fact that Continental sold soybean oil futures contracts while it was buying cotton seed oil futures contracts. This only further establishes Continental's good faith. Neither Vogel nor any other defendant had any role in regulating the soybean oil futures market on the Chicago Board of Trade. If Continental had wished to "stand pat" in vegetable oil while profiting from some scheme to cause or facilitate a decline in the cottonseed oil futures market, Continental would have bought soybean oil futures, and sold cottonseed oil—the reverse of what Continental in fact did.

POINT III

Plaintiff has no case against Continental.

As noted above, plaintiff's case against Continental was based solely on a theory of vicarious liability. Since Vogel cannot be held liable, neither can Continental. Moreover, as demonstrated above (pp. 6-7, Vogel was not Continental's agent on the Board of Managers and there was therefore no basis for vicarious liability. And, as the previous point demonstrates, Continental's good faith was affirmatively proved at trial. There was no justification for naming Continental in the lawsuit, other than the tactical advantage that plaintiff may have hoped to gain by having among the defendants a large and wealthy corporation.

Conclusion

The evidence utterly failed to establish any negligent wrongdoing by Vogel. Still more clearly, there was no evidence of bad faith, an indispensable prerequisite to liability. The claim against Vogel, and the vicarious liability claim against Continental, must therefore fail. For these reasons, in addition to the reasons stated in the defendants' principal brief, we respectfully submit that the judgment in favor of Vogel and Continental should be affirmed.

Respectfully submitted,

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No. 30-2673500
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Cert. Filed in New York County
Commission Expires March 30, 1977

#5360

Affidavit of Service by Mail

In re:

Miller v New York Produce Exchange

State of New York
County of New York. ss.:

Michael Lane,

being duly sworn, deposes and says, that he is over 18 years of age. That on ....., 197....., he served 2 copies of the within Brief in the above named matter on the following counsel by enclosing said two copies in a securely sealed postpaid wrapper addressed as follows:

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Signed Weil Gotshal & Manges
Attorney for Harvey Miller

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